Response to consultation on amending the Civil Procedure Rules to establish environmental review

Q7 What provision should be made in the rules regarding the role of interested parties in environmental review?

1. We consider it would be appropriate to make provision for interested parties in environmental review that broadly mirror those for judicial review. In the context of environmental review, interested parties may include the relevant Minister (as defined in the Environment Bill), complainants and other third parties such as landowners and holders of relevant licences or permissions.

2. Allowing such parties to participate may be of assistance to the court in ensuring environmental reviews are dealt with in accordance with the overriding objective (CPR 1.1).

3. Consideration might also be given to creating a presumption that certain parties, such as complainants, are generally to be regarded as interested parties (in a way similar to Practice Direction 54A, para 4.6(2) for judicial review). We do not, however, consider it would be appropriate to presume that the relevant Minister will be an interested party, given that this is left open by the Environment Bill (clause 40(3)).

Q8 What provision should be made in the rules regarding the role of interveners in environmental review?

4. We consider it would be appropriate to allow third parties to intervene in environmental review at the court's discretion, in a way similar to judicial review.

Q9 If you consider there should be a role for interveners, should the application procedures differ in any way from those for judicial review?

5. We consider it would be appropriate to allow for applications to intervene, replicating CPR 54.17 and PD54A, para 12 in a new rule and practice direction for environmental review.

Q10 What provision should be made in the CPR regarding the awarding of costs in environmental review?

6. In our view the appropriate model for environmental review would be that applied in respect of tribunal costs. This would be that the court should only make inter-partes costs orders on the basis of wasted costs or if it considers a party has acted unreasonably in bringing, defending or conducting proceedings (with consequential rules providing for applications, representations and assessment).

7. Such an approach would reflect the unusual nature of environmental review, where both parties must necessarily be public authorities so routine inter-partes costs awards will only serve to recycle public funds. Environmental review also concerns cases brought purely for reasons of the public interest. That said, there may be merit in incentivising early resolution through some provision for costs awards. This can be achieved through the tribunal approach.

8. If this is not preferred, alternative models could be considered. Primarily this might be qualified one-way costs shifting (see CPR 44.13 and 44.14). This may be an appropriate approach bearing in mind that the OEP can only commence an environmental review if satisfied on the balance of probabilities that there has been a failure to comply with environmental law and that this failure is serious. This is an unusually high hurdle merely for a party to commence proceedings. It is a stricter standard than that to be applied by the court in determining cases (a court must apply the balance of probabilities test but need not consider a failure serious). Further, the OEP may only commence environmental review after exhausting an investigation and enforcement process.

9. This would suggest a particularly strong onus on public authorities to consider the position carefully before defending environmental reviews. Should they choose to

defend and lose, it may be appropriate to provide by default that they pay the OEP's costs.

10. The rules for judicial review, including in particular environmental judicial review, provide for the amount of inter-partes costs to be capped (see CPR 45.41 to 45.44 and 46.16 to 46.19). If it is considered appropriate to provide for inter-partes costs in environmental review other than on the basis of unreasonableness, for the reasons given in para 7 above, it may also be appropriate to limit such costs through the use of caps.

Q11 Should provision be made in the CPR regarding the costs of interested parties and interveners in environmental review?

11. In our view the starting point for considering the costs of interested parties and interveners ought to be the same as for the principal parties, namely that inter-partes costs awards should only be made on the basis of unreasonableness. In addition, we believe the rules ought to provide that a principal party should not normally be ordered to pay both the claimant's/defendant's costs and those of an interested party. Nor should interveners ordinarily be able to reclaim their costs from the principal parties. This would broadly mirror the position in judicial review.[1]

Q12 Should provision be made in the CPR to allow claims to be decided without a hearing, replicating CPR 54.18?

12. In our view it may be advantageous to allow for the court and the parties to agree to environmental review being decided without a hearing. This may be particularly appropriate given that, before commencing environmental review, the parties must have followed an enforcement procedure through which arguments ought to have already been aired and evidence disclosed.

13. It would be important, however, for such decisions to be made promptly. Where they result from the initiative of one or other party, the rules might make provision that they

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[1] For interested parties, see *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176; for interveners see s87 Criminal Justice and Courts Act 2015 and CPR 46.15.

apply to the court at the earliest opportunity, for example before the court gives any case management directions.

Q13 Are there any further areas where you consider the procedure for environmental review should differ from that for judicial review?

Pre-action protocols

14. The pre-action protocols annexed to the CPR include a pre-action protocol for judicial review and a general pre-action protocol (Practice Direction - Pre-Action Conduct and Protocols). The latter "*applies to disputes where no pre-action protocol approved by the Master of the Rolls applies*" (para 2).

15. For the reasons given at para 12 above, the objectives given for following pre-action protocols (para 3 of the Practice Direction) should have been met before the OEP applies for environmental review. We therefore consider it should not be necessary to create a pre-action protocol for environmental review. Further, the general protocol ought to be amended to clarify that it does not apply.

Case management

16. In judicial review it is usual for the court to give case management directions only after permission is granted. Since environmental review will not include a permission stage, consideration might be given (for example in a practice direction) to when and how the court would give case management directions.

17. Given the lack of permission stage, thus distinction between Summary and Detailed Grounds, we also believe the rules/practice directions should make clear the expectations on defendants regarding filing defences. They might provide for defendants to produce a single 'grounds of defence' which are complete, address each of the points made in the claim form and accompanying grounds, identify relevant facts and set out the reasoning underling the matter in dispute.

18. To avoid unnecessary process, which may complicate and delay environmental review and add to its cost, defendants might also do this by reference to the material relied on during the prior enforcement process. For the same reasons, and bearing in mind Bill clause 38(2), we believe the rules should allow the court to limit arguments

which defendants did not raise during the prior enforcement process (see, by way of an analogy, PD54A, para 11).

Q14 Do you have any further comments on the approach that should be taken to amending the CPR to establish environmental review?

Appropriate forum

19. The rules provide for judicial reviews regarding environmental law to be heard by the Planning Court (a specialist list within the High Court) (CPR 54.21 to 54.24). Amongst other things, this allows environmental claims to be heard by judges with specialist legal expertise and allows for a fast-track judicial review process.

20. We consider there are advantages to the rules providing that the Planning Court's jurisdiction includes environmental review. It would mean that the judges hearing environmental reviews would be specialists, better placed to deal with cases justly and at proportionate cost.

21. There is also likely to be considerable overlap between the sorts of issues subject to environmental judicial reviews (whether brought by the OEP or by third parties) and environmental review. Providing for environmental reviews to be heard in the Planning Court would therefore sit well with the government's rationale for introducing amendments to the Environment Bill to make the High Court (as opposed to the Upper Tribunal) the appropriate forum.[2]

22. The limitations in bringing environmental review set out in the Environment Bill mean there will be an inevitable delay to commencing proceedings compared to judicial review. It would therefore be particularly important and in the public interest that there is scope for environmental reviews to proceed swiftly, as the rules already provide for cases heard in the Planning Court.[3]

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[2] That rationale being that all alleged breaches of environmental law, whether brought by the OEP in environmental review or in urgent judicial review or by third parties in judicial review, should be heard in a single forum. This is on the basis that doing so will create greater coherence and clarity, promote the interests of good administration and promote a consistent approach towards the interpretation and application of environmental law. (Environment Bill, House of Commons Committee Debate (eleventh sitting), debated on Thursday 5 November 2020, col 347).

[3] If the rules do not provide for the Planning Court to have jurisdiction over environmental reviews, consideration ought to be given to otherwise providing in the CPR for a fast-track process.

Evidence and disclosure

23. As for judicial review, we consider that the court should not need to routinely order disclosure and inspection of documents in environmental review. Rather, the parties should comply with the duty of candour. The importance of complying with that duty is reinforced at various points in the CPR for judicial review (eg PD54A, paras 10 and 12). If the same approach is taken to documentary evidence as for judicial review, we believe similar reinforcement of the duty of candour ought to be included in the rules governing environmental review.

24. Regarding the use of evidence more broadly (including expert evidence) we believe that, whilst not routine, the rules ought to provide for sufficient flexibility to allow the use of expert evidence when reasonably required to resolve proceedings.